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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., PETITIONERS

v.

CITY OF CLEVELAND, OHIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT HOWARD E. DICKEN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–26a) is reported at 448 F. 2d 151. The opinion of the district court (Pet. App. 27a–42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1971. The petition for a writ of certiorari was filed on November 19, 1971, and was granted on February 22, 1972 (405 U.S. 915). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners' jet aircraft struck, and its engines ingested, a large number of birds over the runway during takeoff. The resulting loss of power caused the aircraft to lose altitude, first striking the airport perimeter fence and a pick-up truck, then coming to rest and sinking in the navigable waters of Lake Erie. The question presented is whether petitioners' claim for property damage to the aircraft, allegedly caused by respondents' failure to warn petitioners' pilots of the bird hazard on the runway, lies within admiralty jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in pertinent part:

> Section 2. The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction; * * *.

Title 28 of the United States Code provides in pertinent part:

> § 1333. *Admiralty, maritime and prize cases*
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> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
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> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
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STATEMENT

There is no dispute about the facts material to the issue before the Court. Petitioners are engaged in the business of flying contract and charter flights and of

owning, selling and leasing jet aircraft (App. 16). This action arises out of the crash of petitioners' aircraft during take-off from a runway at Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie (App. 2–3, 13).

When the crash occurred, petitioners' aircraft, manned by a pilot, co-pilot and hostess, was taking off on a flight to White Plains, New York, by way of Portland, Maine (App. 13). Petitioners' aircraft was cleared for takeoff on Runway 6L by respondent Dicken, the federal air traffic controller at the airport. In giving the takeoff instructions, Dicken warned the pilots, "Caution, bird *on end* of runway." (App. 14). He added, "It looks like a million of them" (App. 36).[1]

The aircraft then executed its takeoff and became airborne about midway down the runway (App. 13–14, 36–38). The takeoff flushed the seagulls on the runway and they rose into the airspace above the runway and directly in front of the approaching airborne aircraft (App. 14, 36–38). The aircraft, by this time flying approximately 100 feet above the runway, collided with a large number of seagulls, many hitting its engine intakes and belly (App. 14, 25–27, 36–38). "There was almost immediate total loss of power," (App. 14) caused by the ingestion of birds into the aircraft's jet engines. Subsequent examination of the port engine showed that "[t]he guide veins were bent

[1] These warnings, suggestive of contributory negligence and assumption of risk by petitioners' pilots, appear to have led petitioners to invoke admiralty jurisdiction where respondent would be denied these defenses. Affidavit of Phillip D. Bostwick in Compliance with Rule 2(A)(6), p. 10 n. 1 (Joint Appendix in the United States Court of Appeals for the Sixth Circuit, 21).

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to various angles, * * * [t]he first stage compressor rotator blades were bent, * * * [t]he first stage stator blades, and second stage rotor blades were bent and torn, * * * [t]he compressor area of the jet engine was filled with bird debris, * * * the fan rotor secondary air files were missing [or] * * * bent and ripped, [and] [t]he exit guide veins leading edges had bends and tears" (App. 26). The starboard engine suffered similar damage (App. 26–27).

As a result of the impact and total loss of the aircraft's power, there was a substantial reduction in its air speed (App. 14). Settling back down to the runway, the aircraft veered slightly to the left, struck a portion of the airport perimeter fence and the top of a pickup truck parked adjacent to the fence, and came to rest in Lake Erie less than one-fifth of a statute mile off shore (App. 14, 20–24, 36–38). While there were no injuries to the crew, the aircraft sank and became a total loss (App. 4, 15).

Invoking admiralty jurisdiction, petitioners brought this action for the value of their aircraft against the City of Cleveland, Ohio, as the owner and operator of Burke Lakefront Airport, Phillip A. Schwenz, the airport manager, and Dicken, a Federal Aviation Administration ("FAA") air traffic controller on duty at the airport when the crash occurred (App. 2–4). The district court held that the case was not cognizable in admiralty and dismissed the complaint for lack of jurisdiction over the subject matter[2] (Pet. App. 27a–42a).

[2] The court's action did not deprive the petitioners of their only possible remedy for respondent's alleged negligence since

The district court applied a twofold test of admiralty jurisdiction over maritime torts adopted by the Sixth Circuit in *Chapman* v. *City of Grosse Pointe Farms,* 385 F. 2d 962. By that test, not only must "the locality where 'the substance and consummation of the occurrence which gave rise to the cause of action took place * * *' or * * * 'the place where the negligent act or omission *becomes operative or effective* upon the plaintiff * * *'" be navigable waters (*id.* at 964), but also "[a] relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters" (*id.* at 966).

The district court found that the allegations of the libel satisfied neither of these criteria. With respect to the locality of the tort, the court noted that not only did the negligence (with respect to respondent Dicken's alleged failure to warn of the bird hazard) occur on land, but also "the alleged negligence became operative upon the aircraft while it was over land * * * when the gulls disabled the plane's engines" (Pet. App. 36a–37a). "From this point on," the court concluded, "the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous" (Pet. App. 37a).

Alternatively the court concluded that the wrong bore no relationship to maritime service (Pet. App. 40a–41a):

> Assuming * * * that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the

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they have also filed a civil action against the United States in the district court under the Tort Claims Act, 28 U.S.C. 2674, asserting the same claim (Pet. Br. 7, n. 4).

> relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed "wrong" in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.
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> * * * * *
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> Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off.

The court of appeals (one judge dissenting) affirmed on the ground that "the alleged tort * * * occurred on land before the aircraft reached Lake Erie * * *" (Pet. App. 6a). The dissenting judge, concluding that the holding of the majority conflicted with *Weinstein* v. *Eastern Airlines, Inc.*, 316 F. 2d 758 (C.A. 3), certiorari denied, 375 U.S. 940, argued that "tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land" (Pet. App. 11a, 24a).

ARGUMENT

Introduction and Summary

1. In 1850, despite the numerous cases stating that admiralty's jurisdiction over torts depended on the

locality of the wrong, Mr. Benedict expressed his "celebrated doubt"[3] as to whether such jurisdiction did not depend, in addition to a maritime locality, upon some "relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which admiralty jurisdiction, in cases of contracts, applies." Benedict, *The Law of American Admiralty,* p. 173 (1850).

In 1914, when this Court last considered the matter, it left the question open, finding its resolution unnecessary for the disposition of the case. *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52.

The doubt remains today, although in 1969 the Reporter of the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* ("ALI Study") concluded (p. 233) that "the Supreme Court would hold that locality alone is not sufficient for admiralty jurisdiction."

The Court must either resolve Mr. Benedict's "celebrated doubt" or, like the court of appeals, affirm on the narrower ground that, since the tort had no maritime locality, the suit will not lie in any event, and there is no necessity to decide whether or not a "maritime nexus" is an added requirement.

We urge the former course because we believe that it will enable this Court to fashion criteria for the resolution of cases involving crashes of aircraft into navigable waters which are more logical and coherent than a test of admiralty jurisdiction which depends

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[3] Hough, *Admiralty Jurisdiction—Of Late Years,* 37 Harv. L. Rev. 529, 531 (1924).

exclusively upon the fortuity of where the aircraft falls.

In aviation cases a "locality alone" test of admiralty tort jurisdiction at best provides results based on happenstance and may even lack the compensating virtue of predictability. Given the speed and altitude at which contemporary aircraft travel and the often cataclysmic consequences of a malfunction, whether a disabled aircraft falls on navigable water or land is entirely a matter of chance. Substantive and procedural rights and remedies should not be allocated on such a random basis.

Moreover, the "locality alone" test of admiralty tort jurisdiction may not even provide a predictable guide in aircraft cases. Fortunately in this case it is known that the facts giving rise to a cause of action for property damage—the damage to the aircraft's engines caused by the gulls—occurred over land. Conversely, in all decided aircraft cases brought in admiralty, except *Weinstein, supra,* and other cases involving the same accident, the alleged torts have had plainly maritime localities in that the alleged negligence became operative or effective while the aircraft was over navigable waters. In future cases, however, questions over when and where the alleged negligence took effect and gave rise to a cause of action may lessen the predictability of results, if a locality test exclusively is controlling.

In addition, such a test of admiralty jurisdiction would allow state law to be displaced by federal maritime law in cases in which the state has a para-

mount interest, and there is no competing need for uniformity.

A test of admiralty jurisdiction in aircraft cases which requires a maritime nexus, on the other hand, would rationally relate the cases heard in admiralty to the ordinary business of admiralty courts: cases involving maritime service and commerce. Such a test would allocate to admiralty those accidents, occurring on navigable waters, which involved aircraft performing functions traditionally performed by the shipping industry, such as transoceanic or cross-lake transportation and shipping.

2. Alternatively and more narrowly, we urge that this Court may affirm on the ground stated by the court of appeals: that "the alleged tort * * * occurred on land before the aircraft reached Lake Erie * * *" (Pet. App. 6a).

I

PETITIONERS' CLAIMS ARE NOT WITHIN ADMIRALTY JURISDICTION BECAUSE THE AIRCRAFT'S ACTIVITY BORE NO RELATION TO MARITIME COMMERCE OR NAVIGATION

A. ADMIRALTY TORT JURISDICTION REQUIRES THAT THE ACTIVITY GIVING RISE TO THE TORT BE RELATED TO MARITIME COMMERCE OR NAVIGATION

Despite the broad language of some cases (cf. *The Plymouth*, 3 Wall. 20, 36), this Court has never held that a maritime locality was a sufficient condition of admiralty tort jurisdiction. ALI Study p. 232; see

Gilmore and Black, *The Law of Admiralty*, 22, n. 78 (1957); cf. 7A Moore, *Federal Practice, Admiralty*, ¶.325(3).

The last time this Court considered whether, in addition to a maritime locality, the tort must bear some relation to maritime commerce or navigation in order to be cognizable in admiralty, the Court left the matter open. *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52. This was a libel brought by a stevedore for injuries sustained on board a vessel while loading and stowing copper. The Court sustained admiralty jurisdiction, but found that it did not have to decide whether a maritime locality alone was sufficient for jurisdiction, since (234 U.S. at 61, 62):

> Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. * * *
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> If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. * * * *[4]

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[4] The suggestion in *Weinstein* v. *Eastern Airlines, Inc.*, 316 F. 2d 758, 763 (C.A. 3) that *Imbrovek* rejected the requirement of a maritime relation is inaccurate. The view that the Court found "altogether too narrow" was that, in order for a tort to be "maritime," it must arise out of an injury to a ship caused by the negligence of a ship or a person or out of injury to a person

While the question has yet to be authoritatively resolved by this Court, decisions of this and lower courts support the proposition that a "maritime relation" is a "condition *sub silentio* to admiralty jurisdiction" (*Chapman* v. *City of Grosse Point Farms*, 385 F. 2d 962, 966 (C.A. 6)). In all of the cases in this Court, and most of the cases in lower courts, where admiralty's jurisdiction over a tort has been sustained, the tort has had, in addition to a maritime locality, a significant relation to maritime service.

In sustaining libels *in rem* against vessels for damage to pile-supported beacons, the Court considered the relation to maritime navigation of the beacons with which the vessels had collided. *The Blackheath*, 195 U.S. 361, 367; *The Raithmoor*, 241 U.S. 166, 176–177.[5] In other tort cases, this Court similarly has

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by the negligence of a ship * * *" (234 U.S. at 61; emphasis added). On this issue the Court concluded (*ibid*):

> The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.

[5] In *The Blackheath*, the beacon had been completed when damaged. In *The Raithmoor*, where it was the uncompleted structure upon which the beacon was to rest that was damaged, Justice Hughes stated:

> We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—at least in all cases where the wrong was of a maritime character. * * * The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on

discussed the maritime or non-maritime nature of the tort. See, *e.g.*, *Atlantic Transport Co.* v. *Imbrovek, supra; Chelentis* v. *Luckenbach Steamship Co.*, 247 U.S. 372, 382; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 475–478; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479, 481; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 457; *London Guarantee & Accident Co.* v. *Industrial Accident Commission*, 279 U.S. 109, 123.

Lower courts have repeatedly, but not uniformly,[4] applied a maritime relation test to exclude from admiralty jurisdiction torts deemed unconnected with maritime commerce or navigation. In *McGuire* v. *City of New York*, 192 F. Supp. 866 (S.D. N.Y.), the court dismissed for lack of jurisdiction, a libel for injury caused by contact with a submerged object at a public bathing beach. The court stated (192 F. Supp. at 871–872):

> The proper scope of jurisdiction should include all matters relating to the business of the sea and the business conducted on navigable waters.
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> The libel in this case does not relate to any tort which grows out of navigation. It alleges

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land. * * * This is not the case of a structure which at any time was identified with the shore, but from the beginning of construction locality and design gave it a distinctively maritime relation. * * *

[4] Examples of cases sustaining admiralty jurisdiction over torts having a maritime location, but no relation to maritime service, are *King* v. *Testerman*, 214 F. Supp. 335 (E.D. Tenn.) (injuries to a water skier) and *Davis* v. *City of Jacksonville Beach, Florida*, 251 F. Supp. 327 (M.D. Fla.) (injury to a swimmer by a surfboard).

> an ordinary tort, no different in substance because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line. Whether the City of New York should be held liable for the injury suffered by libellant is a question which can easily be determined in the courts of the locality. To endeavor to project such an action into the federal courts on the ground of admiralty jurisdiction is to misinterpret the nature of admiralty jurisdiction.

The Fifth and Sixth Circuits have recently affirmed the dismissal of libels for failure to show a significant relationship between the alleged wrong and maritime activity. *Peytavin* v. *Government Employees Insurance Co.*, 453 F. 2d 1121 (C.A. 5); *Chapman* v. *City of Grosse Point Farms, supra.* Other cases holding that admiralty jurisdiction was not properly invoked because the torts, while having a maritime locality, lacked a significant relationship to maritime navigation and commerce, include *Hastings* v. *Mann*, 226 F. Supp. 962, 964–965 (E.D. N.C.), affirmed, 340 F. 2d 910 (C.A. 4), certiorari denied, 380 U.S. 963 (injury sustained while launching outboard motorboat from ramp extending into navigable water); *Smith* v. *Guerrant*, 290 F. Supp. 111, 113–114 (S.D. Texas) (water damage to forklift which was dropped into harbor waters by a land based crane). See also, *Weinstein* v. *Eastern Airlines, Inc.*, 203 F. Supp. 430, 433 (E.D. Pa.), reversed, 316 F. 2d 758 (C.A. 3), certiorari denied, 375 U.S. 940; *Thomson* v. *Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555, 557–558 (D. Md.); *Gowdy* v. *United States*, 412 F. 2d 525, 527–529 (C.A.

6), certiorari denied, 396 U.S. 960; *Szumski* v. *Dale Boat Yards*, 48 N.J. 401, 226 A. 2d 11, certiorari denied, 387 U.S. 944. Like this Court (*supra*, pp. 11–12), lower courts have frequently bolstered their finding of admiralty jurisdiction by reference to the relation of the wrong to maritime activities.[7]

"[A]n even more damaging indictment" of the concept of admiralty tort jurisdiction based exclusively on locality "is found in the number of times courts and the legislature have had to create exceptions to that doctrine in order to effectuate just results." 7A Moore, *Federal Practice, Admiralty*, ¶.325[4]. These exceptions reflect a legislative and judicial recognition that locality alone is not a sufficient criterion of admiralty tort jurisdiction. Not surprisingly the extensions have all been justified in terms of the relation of the wrong to maritime service, commerce and navigation.

The right to maintenance and cure extends to a seaman's injuries occurring on land while in the service of his ship. In *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, the Court sustained the appli-

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[7] See, *e.g.*, *The Poznan*, 276 Fed. 418, 433–434 (S.D.N.Y.); *Sidney Blumenthal & Co.* v. *United States*, 30 F. 2d 247, 249 (C.A. 2); *United States* v. *Matson Navigation Co.*, 201 F. 2d 610, 613–615 (C.A. 9); *Weinstein* v. *Eastern Airlines, Inc.*, *supra*, 316 F. 2d at 763; *O'Connor & Co.* v. *City of Pascagoula, Mississippi*, 304 F. Supp. 681, 683 (S.D. Miss.); *State of California* v. *S. S. Bournemouth*, 307 F. Supp. 922, 925 (C.D. Calif.); *Watz* v. *Zapata Off-Shore Co.*, 431 F. 2d 100, 110–111 (C.A. 5).

cation of the Jones Act[8] to injuries to a seaman on land by the following analogy to maintenance and cure (318 U.S. at 41–42):

> [T]he maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land. * * *[9]

The doctrine of unseaworthiness, by which a seaman or a longshoreman may recover from a ship

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[8] Act of June 5, 1920, Ch. 250 § 33, 41 Stat. 1007, 46 U.S.C .688. In pertinent part the Act gives "[a]ny seaman who shall suffer personal injury in the course of his employment" a cause of action in tort enforceable, at his election, in admiralty or at law with a right to trial by jury. See *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375; *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1.

[9] After citing ancient and contemporary authorities for this conclusion, the Court stated (318 U.S. at 42):

> Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. * * * That status has from the beginning been peculiarly within the province of the maritime law * * *.

Despite this suggestion of an origin in contract, in many instances the right is more accurately classified as part of the tort compensation available to a seaman injured by the negligence or deficiencies of his ship or its crew.

owner for personal injuries caused by defects in the ship or its gear, is another area in which admiralty has abandoned the locality limitation in admiralty jurisdiction. In *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555 (C.A. 2), an action based on unseaworthiness brought by a longshoreman injured on shore, the court rejected the argument that breach of the obligation to furnish a seaworthy ship, if occurring on land, was not cognizable in admiralty. The court held that "such a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land" (185 F. 2d at 558). *Strika* was expressly approved in *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 214–215.[10]

A final significant extension of admiralty jurisdiction predicated upon the relation of the wrong to maritime activities is the Extension of Admiralty Jurisdiction Act,[11] which provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
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> * * * * *

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[10] Recently, in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, this Court held not cognizable in admiralty a suit by a longshoreman injured on the dock by an alleged defect in his stevedore employer's pier-based forklift truck. Thus, the shoreward extension of the unseaworthiness doctrine, insofar as longshoremen are concerned, has been limited to injuries caused by defective equipment that is part of the vessel's usual gear or which was stored on board. 404 U.S. at 213.

[11] Act of June 19, 1948, Ch. 526, 62 Stat. 469, 46 U.S.C. 740.

This Act was passed specifically to overrule cases, such as *The Plymouth*, 3 Wall. 20, holding that admiralty provides no remedy for damage done by ships on navigable waters to land structures. *Victory Carriers, Inc.* v. *Law, supra*, 404 U.S. at 209. Under the Act, a case is within admiralty jurisdiction if "the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." *Gutierrez* v. *Waterman Steamship Corp., supra*, 373 U.S. at 210.

The foregoing authorities illustrate that both the courts and Congress, in resolving the tort jurisdiction of admiralty over a particular occurrence or class of occurrences, have looked to the subject matter of the tort in order to define jurisdiction consonant with the history and purposes of admiralty. Cases involving aircraft accidents on or over navigable waters, to which we now turn, provide another occasion where, in determining the jurisdiction of admiralty, a resort to the maritime relation of the tort is warranted.[12]

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[12] Since as early as 1850, commentators have been critical of the "strict locality" rule and have considered locality insufficient for conferral of maritime tort jurisdiction. See, *e.g.*, Benedict, *The Law of American Admiralty* 173 (1850) (retained in § 127 of the 6th ed. (1940)); Gilmore & Black, The *Law of Admiralty* 22 (1957); 7A Moore, *Federal Practice, Admiralty*, ¶.325[5] (2d ed. 1970); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 229–234 (1969); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 264 (1950); Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9 Colum. L. Rev. 1, 8–9 (1909); Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 531–533 (1924); Robinson, *Tort Jurisdiction in American Admiralty*, 84 U. Pa.

B. WITH THE EXCEPTION OF *WEINSTEIN*, AND OTHER CASES INVOLVING THE ACCIDENT THERE INVOLVED, THE AIRCRAFT CASES IN WHICH ADMIRALTY JURISDICTION HAS BEEN UPHELD HAVE SATISFIED BOTH THE CRITERIA OF MARITIME LOCALITY AND MARITIME RELATION

While there are numerous cases sustaining admiralty's tort jurisdiction over crashes of aircraft into navigable waters, analysis of those cases shows that—with the exception of the cases arising from the Boston Harbor crash [13]—each involved a tort which, in addition to a maritime locality, had a significant relation to maritime commerce. Thus, these cases further support our contention that the presence of a "maritime relation" is a requirement of admiralty jurisdiction.

The development of admiralty jurisdiction over aircraft crashes into navigable waters indicates that such jurisdiction was initially doubted, but came to be recognized in a context where its absence would have left the victim without remedy.

In the early aircraft cases brought in admiralty, most of which turned on the characterization of an aircraft as a maritime vessel, courts were reluctant to find admiralty jurisdiction. In one of the first significant cases, *The Crawford Bros. No. 2,* 215 Fed. 269, 271 (W.D. Wash.), in which a libel *in rem* for

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L. Rev. 716, 734 (1936); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 Colum. L. Rev. 1084, 1091–1092 (1964); Note, *Admiralty Jurisdiction Over Torts*, 25 Harv. L. Rev. 381, 382 (1912); Note, *Admiralty Jurisdiction of Torts*, 18 Harv. L. Rev. 299 (1905).

[13] See note 21, *infra*, p. 27.

repairs was brought against an airplane which had crashed into Puget Sound, the court stated:

> In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the court that, in the absence of legislation conferring jurisdiction, none would obtain in this court, and that questions such as those raised by the libelant must be relegated to the common law courts, courts of general jurisdiction.
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> * * * [L]egislation is necessary for the regulation of air craft. They are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime.[14]

The *Crawford Bros.* was followed by a number of cases dealing with seaplanes, in which admiralty jurisdiction was generally restricted to claims arising out of occurrences involving seaplanes that were afloat on navigable waters.[15]

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[14] See, also, *United States* v. *One Waco Bi-Plane*, 1933 U.S. Av. 159 (D. Ariz.) (libel *in rem* for repairs to airplane held not cognizable in admiralty because airplanes not the subject of maritime jurisdiction), reversed (without mention of this point) *sub nom. United States* v. *Batre*, 69 F. 2d 673 (C.A. 9).

[15] See, *e.g.*, *Matter of Reinhardt* v. *Newport Flying Service Corp.*, 232 N.Y. 115, 117–118, 133 N.E. 371 (workmen's compensation claim for injuries sustained in preventing moored seaplane from drifting onto beach dismissed because cognizable in admiralty); *United States* v. *Northwest Air Service, Inc.*, 80 F. 2d 804, 805 (C.A. 9) (libel *in rem* for repairs made to seaplane while on land dismissed because not cognizable in admiralty); *Dollins* v. *Pan-American Grace Airways, Inc.*, 27 F. Supp. 487, 488–489 (S.D.N.Y.) (seaplane held not a vessel within limitation of

More recently, the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. 761, *et seq.*, has led admiralty courts to take jurisdiction in cases of aircraft crashes at sea, where failure to do so would leave the decedent's family without a remedy.[16] Prior to this Court's recent decision

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liability statutes in wrongful death action arising out of crash on high seas); *Noakes* v. *Imperial Airways, Ltd.*, 29 F. Supp. 412, 413 (S.D.N.Y.) (same); *Lambros Seaplane Base* v. *The Batory*, 215 F. 2d 228, 231 (C.A. 2) (downed seaplane held a vessel subject to maritime salvage and salvor's lien). Contra, *Wendorff* v. *Missouri State Life Insurance Co.*, 318 Mo. 363, 372, 1 S.W. 2d 99, 103 (seaplane capsized by wave causing death held aerial navigation device for purposes of life insurance exclusionary clause).

[16] The exercise by courts of maritime tort jurisdiction over cases involving aircraft has taken place in the absence of guidance either from Congress or this Court. Only two of the statutes that are expressly applicable to aircraft appear to have any relevance. The Federal Aviation Act of 1958, 72 Stat. 799, as amended, 49 U.S.C. 1509(a), the successor to the Air Commerce Act of 1926, 44 Stat. 572, formerly 49 U.S.C. 177, exempts all aircraft, including seaplanes, from conformity with United States' navigation and shipping laws. This statute has been construed neither to create nor to limit judicial jurisdiction and as not precluding the exercise of admiralty jurisdiction over aircraft crashes into navigable waters. *Weinstein* v. *Eastern Airlines, Inc.*, *supra*, 316 F. 2d at 765–766. See, also, *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 93 (N.D. Calif.); *Lambros Seaplane Base* v. *The Batory*, *supra*, 215 F. 2d at 232.

In addition, by a provision of the criminal code, 18 U.S.C. 7(5), there are included within the United States' criminal jurisdiction offenses committed on any public or private United States' aircraft while in flight over the high seas or any other waters within the admiralty jurisdiction of the United States but outside the territorial jurisdiction of any State. See *United States* v. *Peoples*, 50 F. Supp. 462 (N.D. Calif.) and *United States* v. *Cordova*, 89 F. Supp. 298 (E.D.N.Y.), which indicate that the fact that crimes committed aboard aircraft flying over the high seas were not covered by statute led to the enactment in 1952 of that provision.

in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, the general maritime law did not permit an action for wrongful death. *The Harrisburg*, 119 U.S. 199. The only applicable remedy was provided by state wrongful death statutes, upon which suits in admiralty could be based. *Western Fuel Co.* v. *Garcia*, 257 U.S. 233. Although such a state statute could be applied to deaths on the high seas caused by tortfeasors who had a connection with the state (*The Hamilton*, 207 U.S. 398), most state wrongful death statutes were limited to occurrences on state territorial waters. Thus in most instances there could be no recovery for wrongful deaths occurring on the high seas. To fill this void, and to provide a uniform remedy for wrongful deaths on the high seas, Congress in 1920 enacted the Death on the High Seas Act, 46 U.S.C. 761, which provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representatives of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty * * *.

The first aircraft crash case brought under the Act was *Choy* v. *Pan-American Airways Co.*, 1941 Am. Mar. Cas. 483 (S.D.N.Y.), which involved an action on behalf of a passenger killed in the crash of a seaplane into the Pacific Ocean. The court, observing that the language of the Act is "broad" and "makes no reference to the navigation of vessels," sustained its application (1941 Am. Mar. Cas at 484–485), saying:

> The statute certainly includes the phrase "on the high seas" but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase "beyond a marine league from the shore of any State" may be said to include a vertical sense and another dimension. * * * The Death on the High Seas Act was intended to confer a right and we recognize no reason why its language should be narrowly construed whatever doubt may now exist that a given set of facts was in the minds of any of the legislators who framed or adopted it. * * *

Since *Choy*, the great majority of actions for wrongful death arising out of aircraft crashes into the sea beyond one marine league from shore have been brought pursuant to the Death on the High Seas Act. Admiralty jurisdiction under the Act has been sustained where death, or a wrongful act eventually resulting in death, occurred on or over the high seas.[17]

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[17] See, *e.g.*, *Wyman* v. *Pan-American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. 2d 420 (Sup. Ct.), affirmed, 267 App. Div. 947, 48 N.Y.S. 2d 459, appeal denied, 293 N.Y. 878, 49 N.Y.S. 2d 271, certiorari denied, 324 U.S. 882 (disappearance of transoceanic flight); *Pardonnet* v. *Flying Tiger Line, Inc.*, 233 F. Supp 683 (N.D. Ill.) (same); *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif.) (cause of crash of transoceanic flight unknown); *Trihey* v. *Transocean Air Lines*, 255 F. 2d 824 (C.A. 9) (same); *Lacey* v. *L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass.) (crash into water allegedly caused by negligent inspection of aircraft while on land); *Noel* v. *Airponents, Inc.*, 169 F. Supp. 348 (D. N.J.) (same); *Lavello* v. *Danko*, 175 F. Supp. 92 (S.D. N.Y.) (same); *Stiles* v. *National Airlines, Inc.*, 161 F. Supp. 125 (E.D. La.), affirmed, 268 F. 2d 400 (C.A. 5), certiorari denied, 361 U.S. 885 (crash into water allegedly caused by failure of land-based airline personnel to advise pilot

Most courts have held that such actions are exclusively within admiralty jurisdiction.[18]

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of turbulent weather conditions in flight path); *D'Aleman* v. *Pan American World Airways*, 259 F. 2d 493 (C.A. 2) (death of passenger, allegedly caused by fear, on land four days after unscheduled landing of aircraft which had experienced engine trouble while flying over high seas); *Blumenthal* v. *United States*, 189 F. Supp. 439 (E.D. Pa.), affirmed, 306 F. 2d 16 (C.A. 3) (death by drowning after apparently successful bail-out of disabled aircraft); *Kropp* v. *Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D. N.Y.) (accidental ejection into sea of decedent from aircraft on radar test flight).

Contra, *King* v. *Pan American World Airways*, 166 F. Supp. 136 (N.D. Calif)., affirmed, 270 F. 2d 355 (C.A. 9.), certiorari denied, 362 U.S. 928 (in wrongful death action on behalf of airline employee against employer, Death on the High Seas Act held inapplicable and California Workmen's Compensation Act applied). Compare *Nalco Chemical Corp.* v. *Shea*, 419 F. 2d 572 (C.A. 5).

[18] See, *e.g.*, *Wilson* v. *Transocean Airlines*, *supra* at 91, 94–98; *Higa* v. *Transocean Airlines*, 124 F. Supp. 13, 15 (D. Hawaii), affirmed, 230 F. 2d 780, 783, 785 (C.A. 9), certiorari dismissed, 352 U.S. 802; *Noel* v. *Linea Aeropostal Venezolana*, 144 F. Supp. 359 and 154 F. Supp. 162 (S.D.N.Y.), affirmed, 247 F. 2d 677, 680 (C.A. 2), certiorari denied, 355 U.S. 907; *First National Bank in Greenwich* v. *National Airlines, Inc.*, 171 F. Supp. 528, 536 (S.D.N.Y.), affirmed, 288 F. 2d 621 (C.A. 2); *Gordon* v. *Reynolds*, 10 Cal. Rptr. 73 (Dist Ct. App.); *Bergeron* v. *Koninklijke Luchtvaart Maatschappiz, N.V.*, 188 F. Supp. 594, 597 (S.D.N.Y.), appeal dismissed, 299 F. 2d 78 (C.A. 2); *Blumenthal* v. *United States*, *supra*, 189 F. Supp. at 446; *Devlin* v. *Flying Tiger Lines, Inc.*, 220 F. Supp. 924, 928 (S.D.N.Y.); *Jennings* v. *Goodyear Aircraft Corp.*, 227 F. *Supp.* 246, 247–248 (D. Del.); *Dugas* v. *National Aircraft Corp.*, 300 F. Supp. 1167, 1168 (E.D. Pa.), remanded on other grounds, 438 F. 2d 1386, 1388 (C.A. 3); *Kropp* v. *Douglas Aircraft Co.*, *supra* at 453. Contra, *Choy* v. *Pan-American Airways Co.*, *supra; Wyman* v. *Pan-American Airway, Inc.*, *supra; Sierra* v. *Pan-American World Airways*, 107 F. Supp. 519 (D. P.R.); *Ledet* v. *United Aircraft Corp.*, 24 Misc. 2d 1010, 204 N.Y.S. 2d 604 (Sup. Ct.).

The cases holding that jurisdiction over tort claims involving aircraft brought under the Death on the High Seas Act was exclusively in admiralty were relied upon to create a further extension of admiralty jurisdiction to similar claims arising out of torts on or over navigable waters within one marine league of shore and navigable inland waterways.

The first such case to reach the courts grew out of the 1960 crash of an Eastern Airlines Electra that collided with birds over the runway and crashed into Boston Harbor within one minute after take-off. *Weinstein* v. *Eastern Airlines, Inc.*, 203 F. Supp. 430 (E.D. Pa.), reversed, 316 F. 2d 758 (C.A. 3), certiorari denied, 375 U.S. 940. Claims for wrongful death were brought in admiralty against Eastern for alleged negligence in operation and maintenance and against Lockheed and General Motors for alleged negligence in design and manufacture. Additional allegations of breach of warranty were also made against them. The district court dismissed both the tort and contract claims for lack of jurisdiction. Distinguishing air crash cases brought under the Death on the High Seas Act and rejecting libellants' exclusive reliance on locality, the court held that maritime tort jurisdiction depends (203 F. Supp. at 433):

> in the absence of statute, [upon] a maritime locality plus some maritime connection * * *. Therefore, until Congress establishes such jurisdiction by statute, admiralty jurisdiction does not encompass causes of action arising from crashes of airplanes into the navigable waters of a state * * *.

Similarly, "[w]hile it * * * assumed that a contract between libellants' decedents and [Eastern] did exist," the court found that "such contract had no maritime aspects at all." 203 F. Supp. at 434. On appeal, the Third Circuit affirmed with respect to the contract claims but reversed with respect to the tort claims. Finding that there was both a maritime locality and, assuming its necessity, a maritime nexus, the court of appeals stated (316 F. 2d at 763–765):

> An apt analogy to the situation at bar can be drawn * * * from the cases construing the Federal Death on the High Seas Act * * *. No reference to aircraft is made in the language of the Act. Nonetheless, it has been held clearly that tort claims for wrongful death arising out of the crash of an aircraft on navigable waters beyond one marine league from shore are within the terms of the Act and cognizable in admiralty.
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> * * * * *
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> In the appeals at bar the jurisdictional authority, 28 U.S.C.A. § 1333, is identical with that in the cases under the Death on the High Seas Act. The requisite statutory cause of action for wrongful death, however, is provided here by a state wrongful death act. If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well. To hold otherwise would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the

Constitution and implemented by 28 U.S.C.A. § 1333 [footnotes omitted].

Subsequent cases have sustained admiralty jurisdiction over claims for wrongful death or personal injury arising out of aircraft accidents occurring on or over navigable waters within one marine league of shore and navigable inland waterways, as well as personal injury claims arising out of aircraft accidents occurring on or over the high seas.[19]

With the exception of *Weinstein*[20] and other cases

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[19] See *Bergeron* v. *Aero Associates, Inc.*, 213 F. Supp. 936 (E.D. La.) (decedents' survivors have cause of action for wrongful death under Death on the High Seas Act and injured plaintiff has cause of action in maritime tort for helicopter crash into high seas); *Notarian* v. *Trans World Airlines, Inc.*, 244 F. Supp. 874 (W.D. Pa.) (personal injuries sustained when aircraft jolted while flying over high seas); *Horton* v. *J. & J. Aircraft, Inc.*, 257 F. Supp. 120 (S.D. Fla.) (personal injuries sustained in crash of aircraft into high seas); *Harris* v. *United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa) (wrongful death arising out of crash of aircraft into Lake Michigan); *Thomas* v. *United Air Lines, Inc.*, 54 Misc. 2d 540, 281 N.Y.S. 2d 495 (Sup. Ct.), reversed on other grounds, 30 App. Div. 2d 32, 290 N.Y.S. 2d 753, reversed on other grounds, 24 N.Y. 2d 714, 301 N.Y.S. 2d 973, certiorari denied, 396 U.S. 991 (same); *Hornsby* v. *The Fishmeal Co.*, 285 F. Supp. 990 (W.D. La.) (wrongful death arising out of aircraft collision over Louisiana territorial waters), reversed on other grounds, 431 F. 2d 865 C.A. 5).

[20] Even *Weinstein* did not sustain admiralty jurisdiction on the basis of locality alone. The court "[a]ssum[ed] *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction" and concluded that a crash into navigable water provided that nexus. 316 F. 2d at 763. As we discuss *infra*, this concept of maritime nexus not only equates maritime relation with maritime locality, but equates it with an erroneous concept of maritime locality.

arising from the Boston Harbor crash,[21] the torts in all these aircraft accident cases not only have had a maritime locality, in that the alleged negligence became operative or effective while the aircraft was over navigable waters, but also have had a significant relation to maritime commerce or navigation, in that the aircraft involved was at the time performing a function that previously would have been performed by a ship or other waterborne vessel. Thus, the aircraft crash cases in lower courts, for the most part, support the view that a maritime relation has been a "condition *sub silentio* to admiralty jurisdiction." *Chapman* v. *City of Grosse Pointe Farms, supra*, 358 F. 2d at 966.

This is the first aircraft crash case brought in admiralty to reach this Court. For reasons to which we now turn, we urge this Court to hold that a maritime relation, in addition to a maritime locality, is a prerequisite to the exercise of admiralty tort jurisdiction over aircraft accident cases.

C. THE EXERCISE OF ADMIRALTY JURISDICTION IN AIRCRAFT ACCIDENT CASES REQUIRES THAT THE TORT BEAR A SIGNIFICANT RELATION TO MARITIME COMMERCE OR NAVIGATION WHICH IS ABSENT IN THIS CASE

"We are dealing here with the intersection of federal and state law" (*Victory Carriers, Inc.* v. *Law,*

[21] A further exception may have been involved in the Lake Michigan crashes litigated in *Harris* v. *United Airlines, Inc., supra*, and *Thomas* v. *United Airlines, Inc., supra*. The facts as stated in the opinions are insufficient to determine if the aircraft was transporting passengers across the Lake, or passed over the Lake fortuitously.

404 U.S. 202, 211–212). In *Victory Carriers*, involving an attempt to expand the doctrine of unseaworthiness, this Court recently admonished that "[i]n these circumstances we should proceed with caution * * *" (*id.* at 212). Quoting from *Healy* v. *Ratta*, 292 U.S. 263, 274, the court observed (404 U.S. at 212):

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * *. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

This case appears to have been brought in admiralty to escape both the substantive and procedural limitations of Ohio law (see note 1, *supra*).[22] But there is

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[22] There are significant differences between maritime and non-maritime procedures, remedies and defenses, most of which, as the circumstances of this case demonstrate (see note 1, *supra*), favor the plaintiff's choice of admiralty. In admiralty a libellant may bring his action in a federal district court, without regard to diversity of citizenship, amount in controversy or any other independent basis of federal jurisdiction, in any district in which the defendant can be served or in which any of the defendant's credits or effects can be attached. *Strattan* v. *Jarvis & Brown*, 8 Pet. 4 (amount in controversy); *The Robert W. Parsons*, 191 U.S. 17; *Peyroux* v. *Howard*, 7 Pet. 324 (diversity of citizenship); Fed. R. Civ. P. 82 and Adm. & Maritime Claims Supp. Rule E (28 U.S.C. App., p. 7866). Although not entitled to a trial by jury, a claimant in admiralty has the benefit of a more liberal substantive law, including recovery on the basis of comparative negligence, rather than being precluded by his con-

nothing in the facts of the case which warrants displacement of state law. As the court observed in *Smith* v. *Guerrant, supra*, 290 F. Supp. at 113–114:

> Disputes like the present one, which is only incidentally related to navigable waters and wholly unconnected with maritime commerce, can be litigated in state courts under the diverse rules of state law without affecting maritime endeavors. The basis for the special grant of admiralty jurisdiction is absent here.

While we believe the facts of this case place it outside admiralty jurisdiction on the basis of locality alone, we urge that locality alone, in the absence of a significant relation to maritime affairs, is an insufficient justification for displacing state law in aircraft accident cases. In flights which are principally over land, the fact that an aircraft happens to fall in navigable waters is wholly fortuitous. State law should not be ousted as a basis for deciding disputes in which the state has the paramount interest.

Moreover, the locality test in such cases may even lack "its alleged ease of application." (7A Moore, *Federal Practice, Admiralty* ¶.325[4]). Since the cause of action arises where the alleged negligence took effect (Point II, *infra*), disputes over that question in aircraft cases will invoke further litigation.

A test of admiralty jurisdiction which requires a showing of a significant relationship of the tort to

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tributory negligence, *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408–409, and in the absence of a federal statute to the contrary his claim is barred only by laches, not traditional statutes of limitations. *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 533; *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29, 30–31.

maritime navigation and commerce would assure that the aircraft accident cases heard in admiralty would involve issues similar to those traditionally reserved to admiralty. By the same token it would justify displacement of state law in the interest of developing uniform rules for maritime affairs, which is the historic "basis for the special grant of admiralty jurisdiction" (*Smith* v. *Guerrant*, *supra*, 290 F. 2d at 113).

In our view an aircraft may be said to bear a significant relationship to maritime commerce and navigation only when it is performing functions previously performed by ships or vessels.[23] The petitioners suggest (Pet. Br. 57–61) that any aircraft falling into navigable water has a sufficient relationship to maritime commerce and navigation to satisfy the test of maritime relationship, assuming such a relationship is required. We suggest that such a view of maritime relationship reduces that criterion to nothing more than the maritime locality test. Not everything that happens on or over the water relates to navigation or maritime commerce. If the mere happenstance that an aircraft falls into navigable waters creates a maritime relationship, then that test is the same as the maritime locality test. Moreover, as the circumstances of this case indicate (Point II, *infra*), not every alleged tort which results in an aircraft coming to rest in navigable waters has a maritime locality. Therefore,

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[23] Apart from transoceanic transportation, a good example of such use of aircraft is shown in *Hornsby* v. *The Fishmeal Co.*, *supra*, where two light aircraft used in spotting schools of fish collided.

the petitioners' proposed test of maritime relationship—the bald fact of a crash into, or accident over, navigable waters—might be satisfied even where the maritime locality test is not.

If an alleged tort must bear a significant relationship to maritime concerns in order to be cognizable in admiralty, then this case was not properly brought in admiralty. This point was well stated by the district court (Pet. App. 40a–41a):

> Assuming * * * that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed "wrong" in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.
>
> There is no contention here that the entire spectrum of air travel is imbued with a maritime character merely because some airplanes at certain times might pass over navigable waters. Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. * * *

II

Even On the Basis of the Locality of the Impact of the Alleged Wrongful Acts, Petitioners' Claims Are Not Cognizable in Admiralty

The wrongful acts or omissions of which petitioners complain are the alleged failure of air traffic controller Dicken to warn the crew of their aircraft of the seagulls on the runway and the alleged failure of the City of Cleveland and its airport manager to remove those seagulls from the runway (App. 3–4). The result was a collision over the runway on take-off between the aircraft and a number of seagulls, which caused considerable damage to the aircraft's engines and body and, in turn, led to the crash. Thus, the impact of the alleged wrongful acts or omissions that caused the crash occurred while petitioners' aircraft was over land (see pp. 3–4, *supra*). Accordingly petitioners claims are not cognizable in admiralty.

In applying the locality test of admiralty jurisdiction, it is established that the tort is deemed to have occurred where the wrongful act or omission produced such injury as to give rise to the cause of action.[24] In

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[24] See *e.g.*, *The Plymouth*, *supra*, 3 Wall. at 36; *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U.S. 388, 397; *Cleveland Terminal & Valley Railroad Co.* v. *Cleveland Steamship Co.*, 208 U.S. 316, 319–320; *T. Smith & Son, Inc.* v. *Taylor*, 276 U.S. 179, 181–182; *Vancouver Steamship Co.* v. *Rice*, 288 U.S. 445, 448; *Minnie* v. *Port Huron Terminal Co.*, 295 U.S. 647, 649; *The Admiral Peoples*, 295 U.S. 649, 653; *The Strabo*, 98 Fed. 998, 1000 (C.A. 2); *Fireman's Fund Ins. Co.* v. *City of Monterey*, 6 F. 2d 893, 894 (N.D. Calif.); *Thomson* v. *Bassett*, 36 F. Supp. 956, 957–958 (W.D. Mich.); *The S. S. Samovar*, 72 F. Supp. 574, 583 (N.D. Calif.); *Lacey* v. *L. W. Wiggins Airways, Inc.*, *supra*, 95 F. Supp. at 918; *Wilson* v. *Transocean Air-*

The Plymouth, supra, 3 Wall. at 36, relied upon extensively by petitioners, the Court denied admiralty jurisdiction with the observation that, since "the cause of action [was] not * * * complete on navigable waters, [the fact that the negligence occurred on board a vessel] affords no ground for the exercise of admiralty jurisdiction." In *T. Smith & Son, Inc.* v. *Taylor, supra,* 276 U.S. at 182, where a longshoreman was knocked from the wharf into the water by a sling loaded with cargo which was being lowered over the side of a ship, the Court rejected admiralty jurisdiction because the "[the blow] was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. * * * The substance and consummation of the occurrence which gave rise to the cause of action took place on land. *The Plymouth, supra.*"

In this case, the aircraft was damaged and disabled over land. The fact that the bulk of the damage may have been caused by water does not alter the location of the tort. In *T. Smith & Son, Inc.* v. *Taylor, supra,* 276 U.S. at 182, this Court held:

> [Plaintiff in error] argues that as no claim was made for injuries sustained while deceased was

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lines, supra, 121 F. Supp. at 92; *Noel* v. *Airponents, Inc., supra,* 169 F. Supp. at 350; *Lavello* v. *Danko, supra,* 175 F. Supp. at 93; *Weinstein* v. *Eastern Airlines, Inc., supra,* 316 F. 2d at 765; *Thomson* v. *Chesapeake Yacht Club, Inc., supra,* 255 F. Supp. at 558; *Union Marine & General Insurance Co.* v. *American Export Lines, Inc.,* 274 F. Supp. 123, 130 (S.D.N.Y.); *Chapman* v. *City of Grosse Pointe Farms, supra,* 385 F. 2d at 964; *McCall* v. *The Susquehanna Electric Co.,* 278 F. Supp. 209, 211 (D. Md.); *Watz* v. *Zapata Off-Shore Co., supra,* 431 F. 2d at 109.

> on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. * * * The contention of plaintiff in error is without merit.

Similarly, in *The Admiral Peoples, supra,* this Court sustained admiralty jurisdiction over injuries suffered by a passenger who fell onto the wharf from a negligently placed or constructed gangplank. The Court approved the lower court's statement that (295 U.S. at 653) "The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."

Contrary to the petitioners' contention, the distinctions made by these cases continue to have relevance in determining jurisdiction in cases where the injury has connections with both land and water.[25] In *Wiper* v. *Great Lakes Engraving Works*, 340 F. 2d 727 (C.A. 6), the decedent's executor asserted that her claim for a death by drowning in a fall from a negligently maintained dock was governed by maritime law. The court affirmed the dismissal of the claim, noting (340 F. 2d at 730):

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[25] Cases in this Court under the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 901–950, do not suggest any departure from these earlier cases. Cf. *Nacirema Operating Co., Inc.*, v. *Johnson*, 396 U.S. 212.

> [T]he negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages, Cleveland Terminal and Valley R.R. Co. v. Cleveland Steamship Co., 208 U.S. 316 * * * (1908); The Plymouth, 3 Wall. 20 * * * (1865).

None of the aircraft tort cases relied upon by petitioners (Pet. Br. 23–40) supports their contention that their property damage claims are cognizable in admiralty. Each of the cases cited—most of which were brought pursuant to the Death on the High Seas Act (see pp. 20–23, *supra*)—involved claims for wrongful death or injury arising out of aircraft crashes into navigable waters or aircraft incidents occurring over navigable waters. Regardless of where the wrongful act causing the crash or incident in each case occurred, the death or injury giving rise to a cause of action was not produced until the crash into or the incident over navigable waters occurred. On the basis of the locality criterion, the torts in each cited case would be deemed to have occurred on navigable waters, and the claims would have been properly adjudicated in admiralty.

The courts below therefore correctly held that petitioners' claims are not cognizable in admiralty because the alleged torts occurred on land before the aircraft reached Lake Erie.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.,
Assistant Attorney General.
ALLAN A. TUTTLE,
Assistant to the Solicitor General.
WALTER H. FLEISCHER,
JAMES C. HAIR, JR.,
Attorneys.

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